Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996	)	MB Docket 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket 01-317
	)	
Definition of Radio Markets	)	MM Docket 00-244
	)	
Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area	)	MB Docket 03-130

TO: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Cumulus Media Inc. ("Cumulus"), acting pursuant to the Commission's Public Notice (Report No. 2630) of September 15, 2003, hereby replies to the opposition (the "Opposition") of the Office of Communication, Inc. of the United Church of Christ et al. (collectively "UCC") to the Petition for Reconsideration (the "Petition") filed by Cumulus in the above-referenced dockets with respect to (1) the Commission's decision to replace the prior rule defining radio markets through the contour overlap methodology (the "Prior Rule") with a new rule (the "New Rule") that would use Arbitron Metro Survey Areas ("Metros") and complementary BIA data to determine the size of radio

markets and (2) the limited grandfather status which the Commission's order provided to existing clusters of commonly-owned radio stations that do not comply with ownership limitations under the New Rule. *See 2002 Biennial Regulatory Review*, FCC 03-127 (July 2, 2003) (the "*Report and Order*").[1]

I. No Justification for New Rule

In its Petition, Cumulus pointed that the *Report and Order* had failed to provide a reasoned justification for the repeal of the Prior Rule and the adoption of the New Rule, especially in light of (1) the Commission's rejection of Arbitron Metros in 1992 as the basis for determining the size of radio markets, (2) the radio industry's use of and reliance on the Prior Rule in thousands of transactions over the course of eleven years that brought financial stability to the radio industry, (3) the presence of only a relative small number of anomalies where the number of radio stations in a market defined under the Prior Rule exceeded the number of radio stations that actually compete with each other, (4) the absence of any demonstrated anticompetitive conduct or other harm to the public interest under the Prior Rule, and (5) the Commission's failure to identify the anomalies that do exist and would be created under the New Rule (thereby leaving unanswered the question whether those anomalies would exceed in number and scope the anomalies created with eleven years' of experience under the Prior Rule).

UCC advances two basic arguments in opposition to the Cumulus' detailed assessment of the *Report and Order*'s flaws in adopting the New Rule. First, UCC contends that petitions for reconsideration cannot be granted in the absence of new facts or anything more than a stated objection to matters "'which have already been settled.'"

[1] To Cumulus' knowledge, UCC was the only party that filed an opposition to Cumulus' Petition.

Opposition at 6 (citing *Regulatory Policy Regarding Direct Broadcast Satellite Service*, 94 FCC2d 741 (1983)). Second, contrary to Cumulus's showing in the Petition, UCC claims that the *Report and Order* did provide a reasoned basis for its adoption of the New Rule because the *Report and Order* (1) did identify some anomalies under the Prior Rule and (2) did allegedly explain why the benefits from the use of Arbitron Metros "outweigh the disadvantages." Opposition at 7-8. Neither of UCC's arguments has any merit.

To begin with, a petition for reconsideration is entirely appropriate to advance arguments that the Commission has not considered (or has reviewed only in a superficial manner). *See Regulatory Policy Regarding Direct Broadcast Satellite Service*, 94 FCC2d at 747 (reconsideration petition inappropriate where all arguments have been "*fully* considered"). That standard is applicable in the instant situation because the *Report and Order* did not (1) provide any explanation as to why the use of Arbitron Metros was considered inappropriate in 1992 but is now viewed as the most reasonable alternative to the Prior Rule, (2) make any substantive comparative analysis with the few anomalies that arose under the Prior Rule with the anomalies which the *Report and Order* acknowledges will arise under the New Rule, (3) provide any explanation grounded in the radio business as to why any flaws in the Prior Rule could not be cured by including in the "numerator" (which identifies the stations to be owned by the buyer after the transaction is consummated) all of the buyer's commonly-owned stations (thus eliminating the so-called *Pine Bluff* problem) or eliminating from the market those stations that do not in fact compete for listeners or advertisers in the "market."

It also bears emphasizing that Cumulus's Petition did in fact present new evidence that was not considered in the *Report and Order*: namely, information concerning

Arbitron's practices that would inevitably create more anomalies under the New Rule than the anomalies created under the Prior Rule. *See* Petition at 14-15. UCC's Opposition does not comment on that new evidence or provide any basis for the Commission to conclude that the anomalies created by those Arbitron practices would be less harmful to the public interest than the few anomalies created under the Prior Rule.

II. Limited Grandfather Status Adverse to Public Interest

In its Petition, Cumulus pointed out that the *Report and Order* erred by limiting the grandfathered status to non-compliant clusters of commonly-owned stations to their current owners and eliminating that grandfathered status upon the sale of the cluster to any third party other than a buyer qualified as a small business under the Small Business Administration's standards. The Petition explained that that limitation would not only unfairly penalize radio station owners who had invested substantial sums in reliance on the Prior Rule but also create a competitive imbalance with those non-compliant clusters that were not sold (because no new owner could assemble a group of stations under the New Rule that would match in number that non-compliant cluster). *See* Petition at 19-20.

For its part, UCC complains that the limited grandfathered status would "lock in a competitive imbalance in favor of existing conglomerates because the non-compliant owner will own more stations than permitted by the limits to which all other owners must adhere." Opposition at 8. Ironically, that comment underscores Cumulus's point that a competitive imbalance would ensue if one non-compliant owner in a market sells its stations while another non-complaint owner remains in place. The answer to that dilemma, however, is not, as UCC recommends, a forced divestiture of stations to require

immediate compliance by *all* station owners whose clusters are not in compliance with the New Rule. Nowhere does UCC comment on the inherent and gross inequity that result would impose on station owners who reasonably relied on the Prior Rule; instead, UCC says only that "financial impairment of investments made in reliance on the old rules does not render the new rules unlawful." Opposition at 9.

In support of that broad statement, UCC cites *DirecTV v. FCC*, 110 F.3d 816 (D.C. Cir. 1997). That case is totally inapposite to the instant situation. *DirecTV* concerned investments made by certain satellite carriers in anticipation of and before a Commission ruling that would entitle all of them to share the benefits of a new direct broadcast satellite license. The situation confronting radio station owners with non-compliant clusters of stations is completely different. Those owners have expended millions of dollars to acquire and operate stations *after* receiving all required Commission approvals in compliance with the Prior Rule. Whatever one can say about frustrating the hopes of parties (like the satellite carriers in *DirecTV*) who wrongly expected Commission authorization, it does not justify the financial harm to radio station owners who invested monies after being explicitly authorized to do so by the Commission.[2]

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[2] UCC also challenges the point in Cumulus's Petition that applying the New Rule to pending applications would have an unlawful secondary retroactvity effect. *See* Opposition at 9-10. Nowhere, however, does UCC provide any explanation as to why the detailed analysis in Cumulus's Petition is flawed. *See* Petition at 16-19. Instead, UCC says only that the Commission "provided a reasoned explanation, based on the record, for the application of the new rule to pending applications." Opposition at 10. In any event, this issue has been and presumably will continue to be rendered moot by the issuance of the court stay. *See* Petition at 4 n.1.

Conclusion

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that the Commission reconsider its adoption of the New Rule to define radio markets and, upon such reconsideration, reinstate the Prior Rule with the qualifications (if warranted on an industry-wide basis) to eliminate the *Pine Bluff* problem and to eliminate from the denominator those stations which do not compete with stations in the market for listeners or advertisers or, if the New Rule is retained (1) apply the Prior Rule to assignment and transfer of control applications that were pending as of the Adoption Date (as defined in the Petition) and (2) provide permanent grandfathered status to non-compliant clusters of commonly-owned stations that were in place prior to the Adoption Date (after augmentation by the consummation of pending applications).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2003, the foregoing Reply to Opposition to Petition for Reconsideration was delivered via first-class U.S. Mail, postage pre-paid to the following parties:

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